

STATE OF SOUTH DAKOTA



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May 5, 2014

Steven M. Pirner PE, Secretary
Department of Environment and Natural Resources
523 E. Capitol
Pierre, SD 57501-3182

Official Opinion No. 14-02

RE: **Regarding Use of Road Right-of-Ways by the Geological Survey Program**

Dear Secretary Pirner,

You have requested an official opinion from this office:

QUESTION:

Whether permission of the adjacent landowner or unit of government is required for DENR's Geological Survey Program to conduct drilling and other related work as provided in SDCL 45-2-4.2 within legal rights-of-way of township, county, state, and federal roads.

ANSWER:

Additional permission is not required because SDCL 1-1-10 provides statutory authority for DENR and the State Geologist to conduct the geological survey authorized by SDCL 45-2-4.2.

FACTS:

You have provided the following factual statement:

The Geological Survey Program, DENR, has a long standing record of performing drilling activities, relating to the investigation of subsurface geology and ground water resources, in the right-of-way along the roads in South Dakota. By using the public rights-of-way, the Geological Survey Program is able to access needed areas throughout the state without impacting productive private property or otherwise inconveniencing private property owners. When relevant, the Geological Survey Program works with the adjacent land owners to avoid negative impact that might be caused in blocking approaches, field entrances, etc. While the program is sensitive to the adjacent landowner's obvious interest, based on SDCL 1-1-10, and as further described in an informal Attorney General's Office opinion dated May 9, 1978, the Program routinely proceeds without permission of the adjacent landowner – in fact, due to absentee owners and other factors, obtaining permission is often impractical and contrary to the efficient pursuit of our work. Similarly, obtaining permission from other units of government, such as counties or townships, is often impractical, as field work schedules must be flexible given the uncertainties that can arise in geological drilling and related work.

IN RE: QUESTION:

As you noted, on May 9, 1978, Attorney General Janklow issued an attorney letter opinion on this same issue. That informal opinion indicated that DENR had the authority to conduct drilling activities within the right-of-way under the authority of SDCL 1-1-10, coupled with the authority to conduct a geological survey provided by SDCL 45-2-1 and a groundwater survey authorized by SDCL 46-3-2. Other than some changes in the statutory authority to conduct the actual surveys, nothing in the legal basis of the 1978 informal opinion has changed, and I agree with the conclusion reached by Attorney General Janklow's 1978 informal opinion.

SDCL 1-1-10 provides:

For the purpose of making surveys required by or essential to the effect of any acts of the United States Congress or of the Legislature of this state or for the determination of boundaries of real estate, any of the duly authorized officers or agents of the United States or of this state, or any engineer or land surveyor duly qualified or registered under the laws of this state, and the persons necessarily and lawfully employed in making any such survey may enter upon lands within the boundaries of this state for such purposes, but this section shall not be construed as authorizing any unnecessary interference with private rights. Nothing in this section shall be construed to permit any person to enter any shaft, tunnel, stope, or underground workings of any

individual person engaged in mining for precious metals without consent of the owner or person in possession of such shaft, tunnel, stope, or underground working.

(Emphasis added).

A plain reading of the underlined portion of this statute clearly authorizes the state geologist to enter private property without permission in order to conduct statutorily authorized surveys. This would include rights-of-way overlying private property.

Although the survey statutes relied upon in 1978 have been repealed by the Legislature, SDCL 45-2-4.2 continues to exist and provides "the state geologist shall continue the making of the actual geological survey of the lands, and earth, and the area beneath the surface of the lands of this state as provided by this chapter."

Therefore, it is my opinion that SDCL 1-1-10 and SDCL 45-2-4.2 authorize the state geologist to utilize the rights-of-way without permission for the purposes of the making of the geological survey.

Very truly yours,

A handwritten signature in black ink, appearing to read "Marty J. Jackley", written in a cursive style.

Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde